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In the Matter of

U.S. DEPARTMENT OF LABOR

V.

ILLINOIS MIGRANT COUNCIL

ALJ LAW LIBRARY

Case No. 84-JTP-10

E-ALJ-000317

INTERLOCUTORY ORDER GRANTING ILLINOIS MIGRANT
COUNCIL'S REQUEST FOR DISCOVERY AND DENYING THE
DEPARTMENT OF LABOR'S MOTION FOR A PROTECTIVE ORDER

This order follows my order of June 13, 1984 in which I denied the Department of Labor's (hereinafter referred to as the Department) claim of privilege from disclosure of the documents and depositions requested by the Illinois Migrant Council (hereinafter referred to as IMC) and requested the Department to reassert the privilege in the proper manner. The Department in a response dated June 25, 1984, attempted to renew its motion for a protective order on the basis of the deliberative process privilege and submitted the affidavit of Patrick J. O'Keefe, Deputy Assistant Secretary, Employment and Training Administration, delineating its claim of nondisclosure.

In a response dated July 2, 1984 IMC alleged that the Department had failed to properly assert the deliberative process privilege and that the privilege was not applicable and did not protect from disclosure the requested documents and depositions. I find after further consideration that the deliberative process privilege has not been properly asserted, by the Department and therefore IMC is entitled to discovery as outlined below.

As stated in my decision of June 13, 1984 to consider an agency's claim of privilege from disclosure of requested discovery materials there must be a formal claim of privilege lodged by the head of the department which has control over the matter. United States v. Reynolds, 345 U.S. 1, 7-8 (1953). There must be a precise statement of the precise and certain reasons for preserving confidentiality and why the public interest would be adversely affected by disclosure, United States v. O'Neill, 619 F. 2d 222, 226 (3rd Cir. 1980) and there must be a specific designation and description of each document claimed to be privileged. Resident Advisory Board et al. v. Rizzo et al., 97 F.R.D. 749, 752 (E.D. Pa. 1983). The Department has failed to follow the specific mandates of my June 13, 1984 order. Patrick J. O'Keefe is not the head of the Department and therefore his affidavit will not suffice. The Department has failed to articulate precise

reasons why the public interest would be affected adversely by disclosure. Moreover, the Department has failed to provide a specific designation and description of the documents and the panel member's testimony claimed to be privileged with sufficient detail to allow a reasoned determination as to the legitimacy of the claimed privilege. In fact, the Department did not even address the documents that IMC requested in its discovery requests dated February 7, 1984 and May 9, 1984. Insofar as the depositions of the panel member's requested by IMC the Department's conclusory allegations that it is privileged is not sufficient.

Specificity of description is necessary to enable the Court to **comply** with its duty of insuring that the privilege is invoked as narrowly as possible consistent with its objections, Resident Advisory Board v. Rizzo, supra. at 753. The privilege is designed to protect only predecisional and deliberative communications. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). The privilege rests on the policy of protecting "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Coastal States Gas Corp. v. Department of Energy, 617 F. 2d 854, 866 (D.C. Cir 1980). To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another. Coastal States Gas Corp. v. DOE, supra. at -866. Vague assertions that proposed testimony and questions probe the Department's **consultative** process and the give-and-take of the Department's decision making process is an insufficient basis for an assertion of privilege. Thus, I find that the Department has failed to properly invoke the privilege and therefore deny its request for a protective order.

Moreover, even if I had found that the Department had met the proper procedural requirements for invoking the privilege it appears that in this instance the privilege would not apply. In order to determine whether the Department's claim that specific documents and testimony by Department officials on the grant selection process is nondisclosable an understanding of the selection process by the Department is crucial. The initial step of the grant selection process as published in 48 Fed. Reg. 23932 (1983) requires the Department to set up competitive review panels of three members to rate individual grant applications in order to determine if the applicant meets the criteria of Section 402 (c)(1). 48 F.R. 23936 Following the review and scoring of the applicants the Panel Chair prepares a panel report listing the scores and comments of the panel members concerning their ratings. (AF-Tab E, Chapt. 1C) 1/

1/ All references to the Administrative File shall be designated by the letters AF.

Upon completion of this process the Panel Chair forwards the scores to the Grant Officer who establishes a competitive range. At the same time the Program and Contracting Offices through desk review score applicants based on past performance. (AF-Tab E, Chapt. 1C) The Grant Officer then **compiles** the review panel scores with past performance ratings of the applicants to determine which applicant's will be selected as potential grantee%.

IMC in its challenge based on non-selection for participation submitted discovery requests which in general asked for the score sheets of the review panel, qualifications of the review panel, the procedures followed by the review panel and the Grant Officer in rating grant awards, specific materials considered by the review panel and the Grant Office, the instructions and regulations followed by the review panel and the Grant Officer and information reflecting on the past performance of the applicants as migrant and season farmworker youth and adult sponsors. IMC also noticed depositions of the three panel members for questions on: facts and factors that led to their decisions; undue influence, prejudice or bias; their knowledge and understanding of the Solicitation for grant applications and knowledge of migrant and seasonal farmworker youth programs; and, the operation and functions of the panel. The Department has claimed that this information is protected from disclosure under the deliberative process privilege.

With the definitions and limitations of the deliberative process privilege as stated earlier in mind I will address what would have been the privilege's substantive application to each of **IMC's** discovery requests if it had been properly invoked.

I find that the privilege if properly invoked would not apply to bar the proposed depositions of the panel members. The panel's function did not involve the formulation of policy or legal considerations. Furthermore, the Department's allegation that the panel evaluations are **predecisional** in nature **because** the Grant Officer makes the final decision is totally unsupported by any evidence. The regulations specifically mandate that the panel members evaluate and numerically rank the applicants. The Grant Officer **must** accept and does not have the authority to undertake a review of the panel scores for the purpose of re-scoring the applicants. Thus, the panel's decision is a final decision and by definition does not fall within the deliberative process privilege. **If an** action has the practical effect of disposing of a matter and is accompanied by a written explanation, that explanation constitutes a final opinion for purposes of the Freedom of Information Act and must be disclosed. NRLB v. Sears, supra. 2/ Moreover,

2/ Exemption 5 of the Freedom of Information Act merely codifies the common law deliberative process privilege. Federal Open Market Committee v. Merrill, 443 U.S. 340, 353 (1979); Schlefer v. U.S., 302 F.2d 233 (D.C. Cir. 1983).

the disclosure **of the** criteria the panel members used in evaluating the applicants and the members thought processes in applying that criteria will not inhibit the free exchange of views within the Department because the Department's own purpose in evaluating and rating the applicants was to obviate the need for further inter-agency deliberation on the matter. See, NRLB v. Sears, supra. at 161. Thus, the very purpose of the **privilege** to protect the give-and-take of agency deliberation is not present in this instance and therefore I find that IMC could depose the panel members as requested even if the Department had complied with the procedural requirements for invoking the privilege.

Lastly, because I have found that the deliberative process privilege has not been invoked in this instance, **IMC's** first set of interrogatories and requests for production which I granted and denied in part in my order of May 9, 1984 on the ground that the privilege applied **must be** reconsidered. At the outset, it should be noted that my order of May 9th as to disclosure of documents relating to past performance still stands and thus the discovery requests **of** February 7, 1984 numbered 3, 4, 5, 6, and 15 the Department need not submit any response. Insofar as **IMC's** second set of interrogatories, dated May 9, 1984 which relate solely to past performance I likewise find that the Department need not respond. The **Solicitation** for Grant Applications clearly states that prior performance, either in a current youth program or in a current 303 program will be consideration in funding. Thus, **IMC's** allegation that if each applicant's youth performance had been utilized that it would have been selected does not present an issue because the regulations do not differentiate between youth and adult programs but instead looks to current programs. All of the remaining discovery requests propounded by **IMC** on February 7, 1984 I now order the Department to produce except for those items it has already provided to IMC.

All documents ordered to be produced herein shall be produced not later than July 20, 1984, **and** transcripts of all depositions authorized herein shall be filed not later than August 20, 1984, unless those periods are extended for good cause shown.


CHARLES P. RIPPEY
Administrative Law Judge

Dated: **6 JUL 1984**
Washington, D.C.